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87-465

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. _____

INTOWN INVESTORS, INC.,

PETITIONER,

v.

AVIS RENT-A-CAR SYSTEM, INC.,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

(1) It is error for the trial court and an abuse of discretion to cancel and terminate a sublease when such relief was not sought by either party by the pleadings, and wherein both parties in the pleadings and evidence acknowledged that the sublease had an option to renew for any remaining portion of the ninety-nine (99) year lease; in that 28 USC §2201 and 2202 was not applicable.

(2) The trial court erred by admitting parol evidence to vary a written sublease and its agreements. (overruled Seitz v. Brewer's Refrigerating Machine Co. (1891), 141 US 510; 12 Sup.Ct. 46).

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Authorities	ii
Petition for Writ of Certiorari	iv
Facts of the Case	1
Facts and Law - Issue One	5
Facts and Law - Issue Two	11
Conclusion	15
Proof of Service	17
Appendix A - Order - Court of Appeals .	A
Appendix B - Order - District Court . .	B
Appendix C - Memorandum - District Court	C

TABLE OF AUTHORITIES

Page

Albermarle Paper Co. v. Moody, (1975), 422 U.S. 405, 95 Sup.Ct. 2362 6

Balark v. Curtin (1981), 655 Fed. 2d 798 14

Baum v. Great Western Inc. of New Mexico, (1983), 703 Fed. 2d 1197 13

Cleveland Police Patrolman v. Voinovich, (1984), 15 Ohio App.3d 72 11

Couffe v. Morris (1982), 676 F.2d 539 . 9

Dagier v. U.S. (1981), 520 F.Supp. 1093 14

Evans Products Co. v. West American Insurance Co. (1984), 736 F.2d 920 . 8

International Harvestor Credit Corp. v. East Coast Truck (1977), 547 F.2d 888 . . . . . 6, 7

Korioth v. Brisco (1975), 523 F.2d 1271 10

Seitz v. Brewers Refrigerating Machine Co. (1981), 141 US 510, 12 Sup.Ct. 46 . . . . . i, 1, 5, 12, 15

State v. Adams (1980), 62 Ohio St. 2d 151 10

Steel Sanitary Co. v. Pangborn, (1930), 30 Ohio Spp. 65 12

Stewart v. Gordon (1899), 60 OS 170 . . 14

U.S. v. Rias (1978), 524 F.2d 118 . . . 10

U.S. v. Walker (1981), 514 F.2d 294 . . 10

U.S. STATUTES AND RULES

54(c) Federal Rules of Civil Procedure . 5, 6

28 USC 2201 9

28 USC 2202 9

28 USC 1332 1

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AVIS RENT-A-CAR SYSTEM, INC.,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, INTOWN INVESTORS, INC., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on 9 July 1987.

OPINION BELOW

The Court of Appeals entered its Memorandum decision denying the Petitioner's appeal that the Trial Court erred in voiding

a publically recorded document of 22 years and allowing parole evidence to dispute the recorded documents contrary to the United States Supreme Court ruling in Seitz v. Brewer's Refrigerating Machine Co. (1891), 141 U.S. 510; 12 Supreme Ct. 46. A copy of the memorandum is attached as Appendix A.

FACTS OF THE CASE

On December 27, 1985, following a trial to the United States District Court, Northern District of Ohio, Eastern Division, Senior Judge William K. Thomas entered a Memorandum and Order (later incorporated in his Judgment Entry dated February 28, 1986), denying all of the relief requested by Plaintiff-Appellee, Avis Rent-a-Car System, Inc. (hereinafter referred to as "Avis").

In its ruling, the Trial Court, in considering parol or extraneous evidence, granted relief not sought in the pleadings by either Plaintiff-Appellee, Avis, or

Defendant-Appellant, Intown, by declaring the sublease between Avis and Intown, dated March 21, 1964, unrenewable subsequent to May 1, 1984. Intown appealed this ruling. Avis cross-appealed the trial court's judgment denying the relief that Avis sought.

The Trial Court had jurisdiction of the action pursuant to 28 USC §1332 Diversity Jurisdiction, and the central and only issue was whether Avis was entitled to recovery of cost of living increases from Intown which Avis owed their lessors the Carey's under a ninety-nine (99) year lease entered into by Avis with the Carey's on June 1, 1954. This cost of living increases in rent every ten (10) years.

This cost of living increase provision was purposely excluded from the sublease between Avis and Intown. Intown is an Ohio corporation now owned by George Giancarli only, which was formed specifically for subleasing the real estate in question in this cause of action.

George Giancarli, personally, purchased the adjoining real estate simultaneously at the time the sublease was executed between Avis and Intown on March 21, 1964, for which Twenty Thousand Dollars ($20,000.00) was paid for the adjoining lot from Avis.

Avis filed a complaint seeking (1) Recovery of the cost of living increases which Avis paid to the Carey's under the lease, and (2) A Declaratory Judgment requiring Intown to pay Avis under the sublease of March 21, 1964, and subsequent amendments to the said sublease all future cost of living increases which Avis required to pay to its lessors (the Careys) under the ninety-nine (99) year lease.

Intown answered that Avis was not entitled to any cost of living increases since it was not contained in the sublease dated March 21, 1964. Intown further answered that Avis commenced paying costs of living increases to the Careys in September of 1964, and that subsequent amendments to

the sublease in 1968 and 1969, and the sebsequent renewal of the sublease in 1974, the established and fixed monthly rental was Three Hundred and Fifty Dollars ($350.00). Avis did not ask for other relief.

At the end of the trial, Avis filed a Motion to Amend the Complaint to conform to the evidence seeking to add a claim for fraud by George Giancarli, owner of Intown.

In his Memorandum and Order, Judge Thomas granted relief that had never been asked for by either party in declaring the sublease to be void for uncertainty and therefore, unrenewable subsequent to May 1, 1984; denied Avis' claim to receive past costs of living increases from Intown; denied Avis' request to reform the sublease to incorporate past and future cost of living increases, and denied Avis' Motion to Amend his complaint to include a claim of fraud.

Both parties appealed, but the petitioner appealed the voiding of the sublease and the fact that parole evidence

had been allowed contrary to United States Supreme Court's ruling as to parole evidence.

The United States Court of Appeals for the Sixth Circuit affirmed without an opinion on July 9, 1987. Petitioner seeks review in this Honorable Court to reaffirm its decision in Seitz vs. Brewer's Refrigerating Machine Co. (1891), 141 U.S. 510; 12 Supreme Court 46 which was overruled by the trial court and to estop trial courts from issuing orders that have not been a subject of the litigation.

REASON FOR GRANTING THE WRIT

ISSUE NUMBER ONE

IT IS ERROR FOR THE TRIAL COURT AND AN ABUSE OF DISCRETION TO CANCEL AND TERMINATE A SUBLEASE WHEN SUCH RELIEF WAS NOT SOUGHT BY EITHER PARTY BY THE PLEADINGS AND WHEREIN BOTH PARTIES IN THE PLEADINGS AND EVIDENCE ACKNOWLEDGED THAT THE SUBLEASE HAD AN OPTION TO RENEW FOR ANY REMAINING PORTION OF THE NINETY-NINE (99) YEAR LEASE.

FACTS AND LAW

Under Federal Rules of Civil Procedure 54(c), reading in pertinent part:

". . . every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if such party has not demanded such relief in his pleadings."

In the landmark civil rights case, Albemarle Paper Co. v. Moody (1975), 422 U.S. 405, 95 S.Ct. 2362, this Court held that under Federal Rule 54(c), a plaintiff may assert damage claims after a complaint seeking only injunctive relief has been filed, or even after a trial on that complaint has been held, but not if the plaintiff's conduct of the case has improper and substantially prejudiced the other party. Here, the apparent word is "prejudice" only not prejudice brought on by the plaintiff's actions, but rather by the Court in granting relief which no party to the contest requested in the pleadings or otherwise.

In International Harvester Credit Corp. v. East Coast Truck (1977), 547 F.2d 888, a litigation between a franchisor, a truck manufacturer, and a franchisee, a truck

dealer, the former seeking to recover monies due on 43 trucks and on notes, the latter alleging breach of contract, fraud on the inducement and negligent misrepresentation. The district judge ruled that the franshisee failed to prove any of its claims. Further, the district judge ruled that under normal circumstances the franchisor would be entitled to relief, yet nevertheless relief that the contract should be rescinded on ground of mutual mistake of fact, where the franchisee not only failed to affirmatively ask for rescission but specifically disawarded any intention of seeking such relief.

On appeal of International Harvestor, supra, the Court of Appeals ruled that the district judge erred, holding that:

> "While federal rule permits, or perhaps even requires, the trial judge in a nondefault case to grant that relief to which a party is entitled even if not requested in the prayer for relief, there are exceptions to the rule, one of which exists where the failure to

> demand the relief granted prejudiced the opposing party.

Here in the case at bar, the ruling of the trial judge in voiding the sublease prejudiced Defendant-Appellant, Intown, who, along with Plaintiff-Appellee, Avis, did not seek such an order either in the pleadings or the evidence. Giancarli owns the adjoining lot purchased from the Respondent, Avis. This was in the transaction with the sublease and was for an express purpose.

In Evans Products Co. v. West American Insurance Co. (1984), 736 F.2d 920, the Third Circuit held that on such instances, the ". . . principal test for prejudice in such situations is whether the opposing party was denied a fair opportunity to defend and offer additional evidence on that different theory." The Evans court further held that the:

> "Rule requiring that judgment entered shall grant the relief to which a party is entitled even when such relief was not demanded in the pleadings meant relief based on a particular theory only if that theory was squarely presented and litigated by the

> parties at some stage as other; (and that) relief may be based on a theory of recovery only if that theory was presented in the pleadings or tried with the express or implied consent of the parties.

Here in the case at bar, rescission of the sublease was not tried as an issue for a theory of recovery, thereby resulting in prejudice to the parties in the ruling handed down by the trial court. The trial court cites 28 USC §2201 and 2202 as authority but these sections require notice of the subject to be tried.

A question then arises as to whether there was implied consent to try the unpleaded issue of voiding the sublease. Defendant-Appellant, Intown, maintains there was none. The court in Couffe v. Morris held that:

> "Implied consent to try an unpleaded issue will not be found if the defendant will be prejudiced; i.e., if the defendant had no notice of the new issue, if the defendant could have offered additional evidence or defense, or if the defendant

> in some other way was denied a fair opportunity to defend.
>
> Coufee v. Morris (1982), 676 F.2d 539.

Here, Defendant-Appellant, Intown, was prejudiced in that Intown had no notice of the new issue, could not present additional evidence and otherwise, defend itself in the case.

In summition, cases are to be decided on the narrowest legal grounds available, and relief is to be granted carefully to the nature of the dispute before the court. U.S. v. Rias (1978), 524 F.2d 118, Korioth v. Brisco (1975), 523 F.2d 1271. A court cannot rely on its own sympathies as a basis for a judicial decision. U.S. v. Walker (1981), 514 F.Supp. 294. To allow for such, results in the courts engaging in abuse of discretion.

The term "abuse of discretion" was defined by the Ohio Supreme Court in State v. Adams (1980), 62 Ohio St. 2d 151. Abuse of discretion may be under a total lack of

authority to act, or where it amounts to an evasion of a positive duty. Cleveland Police Patrolmens Ass'n. v. Voinovich (1984), 15 Ohio App. 3d 72. The district court abused its discretion by canceling and terminating the sublease when such relief was not sought by either party. The Court of Appeals should have reversed and rendered judgment for the petitioner.

REASON FOR GRANTING THE WRIT

ISSUE NUMBER TWO

THE TRIAL COURT ERRED IN ADMITTING PAROL EVIDENCE TO VARY A WRITTEN SUBLEASE AND ITS AGREEMENTS.

FACTS AND LAW

The facts of the case at bar are that the trial court, in the proceedings and in formulating its Memorandum Opinion, clearly and openly admitted the use of evidence of prior negotiations between the parties and unsigned documents as evidence of negotiations in formulating its judgment on the sublease in question.

The facts also show that there was a written contract, and the sublease was duly recorded in Summit County, Ohio. The sublease does not contain any ambiguous phrases or words. The Appellate court in Steel Sanitary Co. v. Pangborn (1930), 30 Ohio App. 65 states in the syllabus:

> Where (a) contract imparts (a) complete legal obligation, it is, in absense of fraud, accident, or mistake, conclusively presumed that (the) whole engagement of the parties was reduced to writing.

The United States Supreme Court for Seitz v. Brewers Refrigerating Machine Co. (1891), 141 US 510, 12 S.Ct. 46 sets forth the following doctrine:

> "When a contract is couched in terms which impart a complete legal obligation, with no uncertainty as to the object, or extent of the engagement, it is (in the absence of fraud, accident or mistake) conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking were reduced to writing. Whether the written contract in this case fully expressed the terms of the agreement between the parties was

> a question of the court; and silence on a point that might have been embodied in it does not open the door to parol evidence.

In effect, the parole evidence rule is a rule of substantive law that declares that specific conduct of parties is without legal effect with respect to their later conduct; that earlier conduct is inoperative to aid or vary later writing, and that therefore, any evidence offered to prove earlier conduct is irrelevant if offered to contradict unambiguous writing. Baum v. Great Western, Inc. of New Mexico (1983), 703 F.2d 1197.

What is clear here is that Avis and Intown had a valid and existing contract at the time of the trial. The writing was a sublease that was duly recorded in the Summit County Ohio Recorder's office for more than 22 years before the action. The sublease had been renewed after notice by the Respondent, Avis. Two amendments to the sublease had been filed with the recorder's office and were of public record. Evidence of proper

negotiations was brought in to vary the meaning of an otherwise unambiguous contract, and in so doing, the trial court flaunted the principals set forth by this court in, Seitz, supra.

Furthermore, the trial judge erred in allowing the preponderance of the evidence test in proving accident, mistake or fraud when the true test level is clear and convincing. Balark v. Curtin (1981), 655 F.2d 798, Stewart v. Gordon (1899), 60 OS 170.

In any event, parole evidence was brought in to be considered contemporaneously with the written contract between Avis and Intown. When a written agreement becomes subject to litigation, and is brought before the court, it is the role of the judiciary to ascertain the intention of the parties, this task is to be accomplished, if at all possible, from an examination of the writing within its "four corners". Dagarier v. U.S. (1981), 520 F.Supp. 1093. Here the trial

court did not rest with an examination of the "four corners" of the written contract, resulting in much prejudicial effect to Defendant-Appellant, Intown, in that the sublease was terminated.

This Honorable Court should allow the writ to review its holding in Seitz, supra, or in the alternative, to order the trial court to follow the mandate of this Court in Seitz v. Brewers Refrigerating Machine Co. and sustain the theory of stare decisis.

CONCLUSION

For the foregoing reasons, the Petitioner, Intown Investors, Inc., respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit and the memorandum of United

States District Court for Northern Ohio,

Eastern Division.

Respectfully submitted,

TEODOSIO, CHERPAS & MANOS

Dated: 4 Sept. 1987

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. _____

INTOWN INVESTORS, INC.,

PETITIONER,

v.

AVIS RENT-A-CAR SYSTEM, INC.,

RESPONDENT.

PROOF OF SERVICE

STATE OF OHIO)
) §§.
COUNTY OF SUMMIT)

THOMAS A. TEODOSIO, after being duly sworn, deposes and says that pursuant to Rule 28.4(a) of this Court he served the within PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT on counsel for the Respondent by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

Charles M. Rosenberg
1100 Citizens Building
Cleveland, Ohio 44114

and depositing same in the United States mails at Akron, Ohio, on 4th September, 1987.

THOMAS A. TEODOSIO,
Affiant

Subscribed and Sworn to Before Me
this 4th day of September, 1987,
at Akron, Ohio.

Notary Public

BARRY M. WARD, Attorney-At-Law
Notary Public - State of Ohio
My commission has no expiration date
Sec. 147.03 R.C.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AVIS RENT A CAR SYSTEM, INC., Plaintiff-Appellee, Cross-Appellant,	.	
v.	.	ON APPEAL FROM THE UNITED
INTOWN INVESTORS, INC., Defendant-Appellant, Cross-Appellee	.	STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: KEITH and NORRIS, Circuit Judges; and PECK, Senior Circuit Judge.

PER CURIAM: Appellant Intown Investors, Inc., appeals and Avis Rent A Car System, Inc. cross-appeals the judgment of the Honorable William K. Thomas in this case concerning the terms of a sub-lease between the parties.

After oral argument and upon careful scrutiny of the briefs of the parties and the underlying record, we **AFFIRM** the district court judgment for the reasons stated in Judge Thomas' memorandum and order dated December 27, 1985.

APPENDIX A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

AVIS RENT A CAR SYSTEM INC.,	)	C80-1565A
	)	
Plaintiff	)	
	)	
v.	)	
	)	
INTOWN INVESTORS, INC.,	)	
	)	
Defendant	)	
	)	

JUDGMENT ENTRY

THOMAS, Senior Judge

This action came on for trial to the court on August 5, 1985 upon the several claims of the plaintiff, Avis Rent A Car System, Inc., (Avis) and the defenses of defendant Intown Investors, Inc. (Intown).

With reference to plaintiff's claim for damages based on cost of living increases in rents owed to it as lessor under its 99-year lease with the fee owners and its sublease with defendant, plaintiff Avis's claim for damages is denied and judgment is entered in favor of defendant Intown.

With reference to the declaratory relief claims of the parties, specifically (1) plaintiff's request for a declaratory judgment that a cost of living increase applies to any renewal of the sublease and (2) defendant's request for a declaratory judgment that it is entitled to renew the sublease for successive terms of ten years until the year 2053 and that the monthly rent for any renewal of the sublease is $350, the court determined and declared that the sublease renewal clause is void for uncertainty and connot be enforced by either party beyond May 1, 1984.

With reference to plaintiff's claim that a fraud was perpetrated against it and to plaintiff's request for reformation of the sublease, judgment is entered in favor of defendant on both the claim of fraud and the request for reformation.

It is further ordered that the court's memorandum and order filed on December 27, 1985 is hereby adopted as findings of fact and conclusions of law in accordance with Rule 52, Federal Rules of Civil Procedure.

In part V.C. of the foregoing memorandum and opinion, the court reserved for the taking of evidence the question of fixing a reasonable monthly rental of the subleased premises after May 1, 1984 until occupancy is terminated. On February 14, 1986, the court took evidence concerning the question. In the court's oral opinion of February 14, 1986, the court determined, and it is now ordered, that $350 per month is a reasonable rent for Intown's occupancy of the premises after May 1, 1984. In addition, the court determined, and it is now ordered, that Intown must cease its occupancy of the premises no later than 90 days from the date this order is filed.

It is further ordered that the court's oral opinion of February 14, 1986 is hereby adopted as findings of fact and conclusions of law in accordance with Rule 52, Federal Rules of Civil Procedure.

It is further ordered that this judgment is hereby entered by the court in accordance with Rule 58, Federal Rules of

Civil Procedure.

IT IS SO ORDERED.

/s/ William K. Thomas
U. S. DISTRICT SENIOR JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

AVIS RENT A CAR SYSTEM, INC.	)	C80-1565A
	)	
Plaintiff	)	
	)	
v.	)	
	)	
INTOWN INVESTORS, INC.,	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER

THOMAS, Senior Judge

Plaintiff, Avis Rent A Car System, Inc. (herein Avis), a non-Ohio corporation and successor to U-Drive-It Company, sues Intown Investors, Inc. (herein Intown), an Ohio corporation, in connection with the sublease of a lot on E. Buchtel Avenue in downtown Akron. On said lot Intown, lessee under said sublease from Avis, lessor, operates a surface parking lot.

Avis, as lessee under a 99-year lease with fee owners Louise and Harold Carey, has been required to pay cost of living increases in addition to the basic monthly rent of

$350. Defendant Intown has paid Avis $350 a month since Intown entered into possession of the lot on May 1, 1964. However, Intown has not paid any cost of living increases. In this action, plaintiff Avis seeks as damages from Intown cost of living increases which Avis has paid to the Careys (amounting to $28,186) as of August 27, 1980 when it filed this action. In a related request, AVis asks for an accounting to determine the amount of its damage since August 1964.

In addition, plaintiff Avis requests this Court to "adjudicate, declare and determine such rights and obligations under the lease agreements" and for an order directing defendant Intown to pay to the plaintiff Avis "an amount equal to any and all cost of living increases which Plaintiff in the future is required to pay to the Careys under and pursuant to the 99-year lease."

In its answer, defendant Intown maintains that

> at the time of the signing of the original sublease...the parties hereto did discuss, did admit, that the

> Defendant would not be obligated under the cost of living provisions of the 99-year lease for the initial term and for any subsequent 10 year terms pursuant to the sublease.

Defendant states that the "sublease provided a ten (10) year term [and] granted Intown Investors, Inc., the defendant, an option to renew for the remaining portion of the 99-year lease," and alleges "the original lease [was] completely changed and supplemented by the subsequent sublease...it was not the intention of the parties that the defendant would be governed by any cost of living increases."

Further, defendant asserts that it "has or will be damaged because of the laches of the plaintiff" and that Avis is therefore barred from recovering damages. Finally, defendant requests "that the court render a declaratory judgment...that the defendant is obligated to pay only the sum of $350.00 per month."

The case has been tried to the court. Supplementing their trial briefs, counsel for the parties presented argument during the trial and each has filed a post-trial brief.

In addition, plaintiff has moved to amend its complaint "to conform to the evidence."

I.

A.

By a written 99-year lease recorded with the Summit County, Ohio Recorder, Louise A. Carey and Harold Nevin Carey on June 22, 1954 demised and leased described lot No. 121 to U-Drive-It Company for a term of 99 years, renewable forever, beginning on September 1, 1954. Located on E. Buchtel Avenue in Akron, Ohio, the lot (69' by 121') contained a parking garage. In 1969, ordered by the city to repair or tear down the building and after an enabling amendment to the 99-year lease, George Giancarli demolished the building.

Article One of the 99-year lease requires the lessee (U-Drive-It Company) to pay to the lessors (the Careys) the sum of $350 a month. Continuing, Article One states:

> Provided, however, that at the end of each ten (10) year period from and after the commencement of the within term the rental due and payable for said sub-sequent ten (10) year period shall be

> increased should the purchasing power of the United States Dollar on the last day of each ten (10) year period be less than the value of said Dollar on the day of the commencement of the within te and that said rental shall be decreased should such purchasing power of the United States Dollar on the last day of each ten (10) year period be greater than the value of said Dollar on the day of the commencement of the within term, to the end that the monthly rental due and payable during each ten (10) year period shall be equivalent in purchasing power to the monthly rental due and payable for the first month of the within term, to-wit: the month of September 1954....

At a time not pertinent to the present case AVis, as successor to U-Drive-It Company, assumed the Carey lease.

In linked transactions consummated in March, 1964, George Giancarli and his wife, Dolores, purchased from Avis the northerly one-half of sublot 122, and his nominee corporation Intown subleased the Carey premises from Avis. The sublease was dated March 21, 1964 and commenced May 1, 1964. After setting forth a description of the Buchtel Avenue property (identically described in the 99-year lease), the Avis-Intown sublease includes the following "TERM," "RENT," "TAXES," and "RENEWAL" clauses:

TERM: To have and to hold the same with appurtenances thereto for the term of ten (10) years, with all the rights and privileges of said Lessee, but subject to all the covenants, agreements, limitations and restrictions contained in the above mentioned Lease from Lessors to Lessee, except as the same are herein specifically limited or changed.[1]

RENT: The said Second Party does hereby covenant and agree with the said First Party that it will pay First Party, or assigns, the annual rental of Four Thousand Two Hundred Dollars ($4,200.00) per annum during the said ten year term in monthly installments of 350.00 per month, payable on the 1st of each month, in advance. This item supplants Article One of the said recorded Lease.

---

1. The phrase "commencing on the first day of May 1964" appears as a handwritten insert with the initials "NS" and "WJM JR." appearing in the right margin of the sublease. These are the initials of Nicholas C. Syracopoulos and William J. Marshall, Jr., each of whom has identified his initials. Nicholas Syracopoulos was Giancarli's attorney when the sublease was negotiated and executed. He prepared the sublease. Attorney William J. "Jack" Marshall, Jr. was an associate of Melvin A. Roberts, Avis's Cleveland counsel. According to Marshall, the sublease was a document "Mel was concerned with." Roberts prepared the property deed (the northerly one-half of sublot 122) from Avis to the Giancarlis, while Marshall prepared the mortgage deed from the Giancarlis to Avis.

TAXES: Second party shall pay in addition to the rental reserved all taxes and assessments on the said demised premises that accrue during the said term after June 30, 1964, and payable July, 1965, and shall, in addition thereto pay to First Party a share pro-rated to date of possession, of the taxes and assessments that accrue in the six month period ending June 30, 1964. This item supplants Article Two of said recorded Lease.

RENEWAL: First Party gives, grants and demise to the Second Party the option to renew this Lease for the full unexpired terms and all future renewals of the recorded Lease at any time during this term, provided all rents have been fully paid and all covenants of this Lease on the part of the Second Party to be performed, kept and observed have been fully performed, kept and observed.

As seen, the "TERM" clause of the sublease incorporates those covenants, agreements, limitations and restrictions of the original or underlying lease except as "...specifically limited or changed...."

Pursuant to the Article One cost of living allowance proviso (COLA) of the 99-year lease, Avis has paid increases plus its basic $350 monthly rent to the Careys. Plaintiff has incurred three separate raises in its obligations to the Careys.[2] On

---

2. The rental increases incurred by

September 1, 1984 the most recent increase took effect when the rent jumped from $651.20 per month to $1,369.09 per month. Plaintiff expects the rental payments to increase further at the conclusion of each successive ten-year term through the expiration of the lease in the year 2053.

B.

During the first day of the trial, George Giancarli[3] testified about negoations for the sublease which he said he held in late 1963 or early 1964 with Allan Mitchell,

---

Avis to date took effect as follows:

Commencing September 1, 1964, $350.00 increased to $404.17 per month.

Commencing September 1, 1974, $404.17 increased to $651.20 per month.

Commencing September 1, 1984, $651.20 increased to $1,369.09 per month.

3. George Giancarli created Intown Investors, owned by himself, his wife Dolores, and his brother, as the nominee to sublease the subject property.

an attorney employed in the real estate department of Avis. In deposition testimony read into evidence, Allan Mitchell denied that he met with Giancarli at any time and denied that he engaged in any negotiations with Giancarli in 1963 or early 1964. In its post-trial brief, plaintiff states that "no representative of plaintiff who was involved in the negotiations attendant to the Sublease is still employed by Plaintiff or was available to testify at trial."

Also on the first day of trial, James R. B. Fitzsimmons, now vice president-properties and facilities of Avis, testified about correspondence in 1974 and 1978 between himself, the real estate department which he directed, and Giancarli. He said that his first knowledge that Intown was not paying the cost of living allowance came when he received notice from Avis accounting office that "arrears [in the Intown Lease] were accumulating." Fitzsimmons had taken no part in sublease negotiations as his employment by Avis did not commence until

December 6, 1971. Upon his return to New York after testifying, a search uncovered 12 documents in "the warehouse files covering the Buchtel Avenue transactions." The newly discovered documents related to the period of sublease negotiations. Marked Court's exhibits Nos. 1 through 12, the documents were received in evidence. Court's exhibit No. 1, entitled "Offer to Lease And to Purchase," was signed by George Giancarli on November 19, 1963, and his signature was witnessed. Thereunder, a typed acceptance of the offer was signed for Avis by vice president Frank J. Max, Jr. and by R. K. Pine, Secretary. These signatures were not witnessed.

Counsel's arguments on whether the evidence of negotiations and other pertinent evidence may be considered by the Court in construing what the parties intended in the sublease language of the "TERM", "RENT" and "RENEWAL" clauses are examined below.

II.

A.

As its third proposed conclusion of law, plaintiff Avis States:

> The Sublease must be reformed to more clearly state that defendant must pay Plaintiff monthly rent equal to Plaintiff's monthly rent payments under the 99 year lease. The term "supplants" in the "RENT" paragraph of the sublease was intended by the parties to supercede only that portion of Article I of the 99 year lease which pertains to rent payable during the ten (10) year term 1964 to 1974, and not any rent payments under said 99 year lease required after the expiration of the initial ten (10) year term of the lease.

In its legal discussion plaintiff argues that under Ohio law, the court may use its equitable powers to reform a contract to conform to the intention of the parties.

As grounds for reforming an instrument, plaintiff claims mutual mistake or fraud.

Further, Avis states that reasonable and equitable considerations are used by courts to interpret ambiguous contractual language. Plaintiff contends that "[w]hen there is ambiguous language in a written contract, parol evidence is admissible to

enable the court to determine the intent of the parties."[4]

After calling attention to Quarry Co. v. Clements, 38 Ohio St. 587 (1883) and Butler Produce & Canning Co. v. Edgerton State Bank Co., 159 Ohio St. 267, 112 N.E.2d 23 (1953), plaintiff asserts:

> Thus, like the preliminary draft in Canning Co. and the oral negotiations in Quarry Co., the "Option to purchase and Lease" is admissible into evidence to determine the meaning of the ambiguity of "supplants" and prove that the parties intended that "supplants" means that Defendant will pay cost of living increases commencing in 1974.

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4. Plaintiff cites Minnesota Mining and Mfg. Co. v. Blume, 533 F. Supp. 493 (S.D. Ohio 1978), aff'd 684 F.2d 1166 (6th Cir. 1982), cert. denied, 460 U. S. 1047, 461 U. S. 939 (1983). Therein Judge Porter observed "[i]n determining the intent of the parties, primary resort should be to the language employed by the parties in the written instrument. (Ohio Citations) If the language employed by the parties is ambiguous, however, parol evidence can be resorted to to determine the intent of the parties. (Ohio Citations)." Id at 501. This is a correct reading of the Ohio law. See Inland Refuse Transfer v. Browning Ferris Industries, Inc., 15 Ohio St. 3d 321, 324, 474 N.E.2d 271, 273-74 (1984), Ohio Crane Co. v. Hicks, 110 Ohio St. 168, 143 N.E. 388 (1924).

Defendant Intown in its trial brief presents a different position. Defendant argues that parol evidence is not admissible to contradict or vary the rental term of the written sublease, which provides for $350 monthly rental payments, and which, it says, ""expressly supplants" the Article One escalation clause of the 99-year lease. Concluding that "[t]he sublease...does not contain any ambiguous phrases or words," defendant explains:

> The words used, as to rent, are specifically set forth as to amcunt and then the sentence, "this item supplants Article One of the Recorded Lease." Burton's Legal Thesaurus, Library of Congress 80-83803 states at page 987:
>
> > Supplant: abolish, accede (succeed) dislodge, displace (replace), replace, succeed (follow), supercede.

Continuing, defendant asserts:

> No ambiguity exists as to the meaning of "supplants" as used in the sublease. ARTICLE ONE (Def. Exhibit "A") contains the escion clauses. The whole ARTICLE ONE clause is now replaced with RENT at Page 2 [of the sublease]. The Plaintiff's demand in the Complaint for past rentals and that the defendant take over the obligation of the Plaintiff to pay the Carey's the escalated rent is not equitable under the plain menaing rule.

B.

It is first essential to determine whether or not the Sublease clauses "TERM," "RENT," or "RENEWAL" are ambiguous. The "TERM" clause clearly states that the lease (sublease) is "for the term of ten (10) years" commencing May 1, 1964. The "RENT" clause expressly fixes $4,200 per annum as "the annual rental" which second party Intown agrees to pay to first party Avis "during the said ten-year term in monthly installments of $350.00 per month." The last sentence of the paragraph states that "[t]his items supplants Article One of the said Recorded Lease." As defendant states, the word "supplants" is synonymous with "replaces." So read, the last sentence is not ambiguous if the $350 per month rent term applies only to the specified ten-year term of the sub-lease, that is, May 1, 1964 - April 30, 1974.

The ambiguity arises in applying the "RENT" clause of $350 per month, as defendant urges, to any renewal period optioned by Intown under the "RENEWAL" clause of the

sublease. The source of the ambiguity is that the "RENEWAL" provision does not state what the rent payment should be during any optioned renewal period. In the absence of a specific rent amount in the renewal clause it is arguable that the "TERM" clause is controlling, because it says that the sublease is subject to the 99-year lease "except...as specifically limited or changed." Thus, during any option renewal period, the rent would be $350 plus the increment under the cost of living clause provided in Article One of the 99-year lease.

Moreover, the "RENEWAL" clause of the sublease is ambiguous as to the length of the renewal period contemplated by this provision. The "RENEWAL" clause gives to the lessee the single option of renewing "this lease for the full unexpired term and all future renewals of the Recorded Lease." Nothing suggests that renewals may be for ten years. An ambiguity therefore arises as to whether the "RENEWAL" clause also grants an option to the lessee to renew the sublease

in ten-year increments during the balance of the 99-years or any additional "term" of 99 years. See infra at pp.28-29.

It is concluded that an ambiguity does exist as to whether the option to renew the sublease may be for additional ten-year terms and whether in any additional ten-year term the rental payment shall be $350 a month or $350 a month plus or minus the increase or decrease provided under the "proviso" of Article One (COLA). Hence, the testimony of George Giancarli, Allan Mitchell, William J. "Jack" Marshall, Jr., and Nicholas Syracopoulos bears on the negotiations leading to the consummation of the sublease and is relevant and admissible. Any document relevant to such negotiations to show the intent of the parties is also admissible. Accordingly, the "Offer to Purchase and To Lease," Court's exhibit No. 1, if otherwise admissible, is parol evidence that can be considered.[5]

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5. This conclusion confirms the court's in-trial ruling on August 5 that ...plaintiff has now, through his earlier cross-examination

III.

A.

As seen, the document entitled "Offer To Lease And To Purchase" (herein "Offer"), was found with 11 other documents in a records warehouse of Avis in a search directed by Mr. Fitzsimmons when he returned to New York after both Mr. Fitzsimmons and Mr. Giancarli testified on August 5. The "Offer" was signed by George Giancarli on November 19, 1963 and lated signed by Max and Pine, Avis executives. Giancarli designated himself as "Purchaser" in the "Offer", acting for "nominees." These nominees were two corporations to be formed. He made an offer to Avis "to purchase said [described] realty [located at the southwest corner of East Buchtel Avenue on South High Street, Akron] and lease the said demised premises [described lot 121, the subject of the Careys' U-Drive-It Company

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5. Continued.

of this witness, established a possible different interpretation of those words which indeed at least makes it a colorable claim of

99-year lease] at the terms, prices, conditions, and stipulations hereinafter set forth."

Giancarli and his wife Dolores purchased said lot from Avis pursuant to the sections of his "Offer" relating to the proposed purchase transaction. By the February 25, 1964 letter of William J. "Jack" Marshall, Jr., found by Avis in its records warehouse (court's exhibit No. 7), attorney Marshall mailed to Avis a deed to the property (northerly one-half of Lot 122). Title was to run from Avis, grantor, to George and Dolores Giancarli, grantees. Marshall gave directions to have the deed executed "by two duly authorized officers of Avis Inc." Attorney Melvin M. Roberts, Marshall's employer, had prepared the deed while Marshall prepared the mortgage deed later executed by George and Dolores Giancarli. The letter noted that the deed

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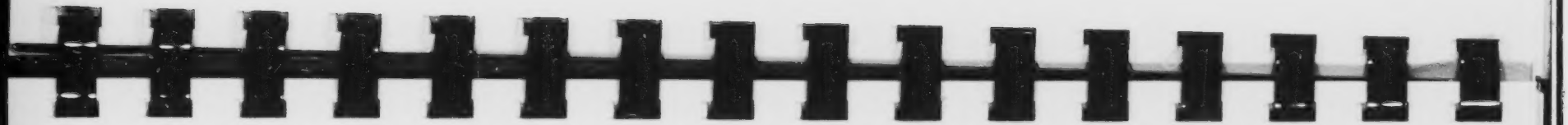
5. Continued.

ambiguity in those words.

I, therefore, am prepared to permit surrounding circumstances to be received....

"runs directly to the Giancarlis rather than to a holding company as called for in the purchase agreement." This supplies direct proof that the purchase terms of the "Offer" were treated as a "purchase agreement." Corroborating this treatment, Marshall enclosed Giancarlis check made payable to Avis Rent A Car in the amount of "$840... dated January 19, 1964." This payment was called for by paragraph 4.A. of the "Offer" that provided that "Purchaser pays herewith the cash sum of $840 which shall constitute the first six months mortgage payments and shall apply on the purchase of the real estate described in Exhibit "A". The payment and the deed to the Giancarlis were acknowledged by R. K. Pine in his return letter of March 2, 1964.

Based on the record before the court, there is no evidence of any meeting taking place during this period of time between Avis representatives or their Cleveland counsel and the Giancarlis or their counsel to discuss or close the purchase deal. Apparently, the



purchase was transacted by mail.

It is in this same time period that, pursuant to the "Offer"'s proposed lease transaction, the sublease was negotiated and eventually recorded. As demonstrated below, the testimony in this case is in glaring conflict as to exactly how the parties came to agree upon the provisions in the sublease.

According to the testimony of George Giancarli, in late 1963 or early 1964 he traveled to the office of Avis in Garden City, New York and there met Allan Mitchell, attorney in the real estate department of Avis. Testifying that Attorney Syracopoulos had made arrangements with Mitchell, Giancarli said that Syracopoulos made the "appointment." Syracopoulos testified that he had a recollection of Mitchell's name but he did not recall what conversations, if any, he had with him.

Asked about his conversation with Mitchell, Giancarli stated that they discussed expenses of Avis, rental amount, taxes and insurance. With reference to rental, he quoted Mitchell

as saying that Giancarli should pay at least $425 per month. He said Mitchell projected that this would be the rental that Avis would be paying beginning September 1964 under the cost of living escalation clause of the 99-year lease.

As to taxes, Mitchell stated that Giancarli should pay all the taxes. Giancarli agreed to pay taxes after June 30, 1964, and back taxes for six months prior to June 30. He stated that the only concession he made was in agreeing to pay the "prior taxes."

Mitchell told him, according to Giancarli that Avis had a piece of property, a bad lease, and wanted to cut its losses. He said that the finest lawyers in New York had looked at the 99-year lease, but they could not break it. Giancarli stated that he told Mitchell that he would never accept a lease with the cost of living provision or Article Twelve of the 99-year lease with its self-containment clause (as to any constructed building).

Giancarli further testified that when

he got back from New York, there may not have been any correspondence about his discussion with Mitchell. He said he may have told Syracopoulos to call Mitchell. He also said that Mitchell was the only name that Syracopoulos had mentioned to him. However, Syracopoulos could not recall any conversation with Mitchell.

At his deposition, Allan Mitchell was shown a copy of the sublease dated March 21, 1964. Asked if he was involved with this document around that period, he answered, "No, I was not." In a series of questions and answers, he testified that he did not negotiate the lease on behalf of Avis; he never met with Giancarli or his attorney in connection with the execution of the lease; he never met with Giancarli prior to the execution of the lease; and he never had an appointment with Giancarli or any other representative of Intown in Garden City, New York in 1963 or 1964.

Questioned as to whether he discussed with Giancarli or any other representative of

Intown "that the rent would have to be increased pursuant to a cost of living adjustment," he answered, "I had no such conversation with respect to that subject at all." He answered "no" to the question of whether he had told Giancarli "that Avis had a building and a piece of property that they could do nothing with." Asked if he had ever told Giancarli or any other representative of Intown prior to signing the lease that he "had some of the finest attorneys in New York attempting to break up the lease, because Avis could do nothing with the property," he responded, "No, I never made such a comment."[6]

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6. Further, Mitchell denied ever telling Giancarli that he "knew Avis' rent was going up but that [he] felt that the Intown lease was the best money [he] could get at $350 and that the amount would be minor, that Avis would have to pay the difference;" and he further denied ever mentioning that Avis "contemplated losing approximately $75 per month on the lease."

In contrast to his lack of knowledge of or participation in the negotiations prior to the execution of the sublease, Mitchell admitted that he was involved in the subsequent negotiation in 1969 relative to the "original lease" and sublease. In connection with the 1969 amendment to the original 99-year lease, Mr. Mitchell stated that he believed "it was all handled on the telephone or through the mail" between Mr. Syracopoulos and himself. Finally, on cross-examination, Mr. Mitchell was asked "if [he] did notarize [the sublease] in March 1964 would [he] believe that [he was] involved at some stage of the negotiations?" he answered that notarization would not "imply" that he "participated" in any manner in that particular matter," but he repeated, "it was my recollection that I was not the notary on that original document." The copy of the complete sublease (plaintiff's exhibit No. 2), reflects that he was correct. The notary public who attested to the signatures of R. K. Pine, treasurer, and W. V. Morrow, Jr., vice presi-

dent of Avis, was Robert A. Reddock, notary public.

Weighing Giancarli's testimony about his asserted meeting with Mitchell and Mitchell's denials of this meeting, the court is not convinced that the meeting occurred or that Mitchell made the statements attributed to him by Giancarli. If Giancarli took the trip to Garden City to visit Avis to negotiate a sublease, the Court is persuaded that he did not talk with Mitchell.[7]

When he testified on August 5, Giancarli made no reference to his "Offer" of November 19, 1963 to Avis. At side bar on that day, during Giancarli's testimony, the Court asked counsel:

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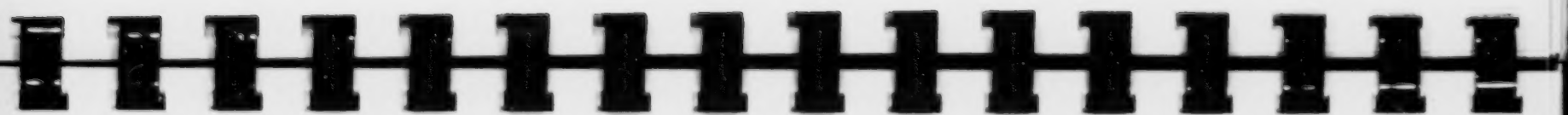
7. The Court is also unable to assume that Giancarli met at Garden City with any other representative of Avis. Asked on August 5 by his counsel if he recalled "any other name beside Mr. Mitchell at that time," he answered:

> Mr. Mitchell is the only gentlemen I've ever been involved with. To the best of my knowledge, that would apply with Mr. Syracopoulos. He brought up no other name to me.



> Was there anything in writing at the time that Mr. Giancarli, as he states, had this interview or this conference with Mr. Mitchell? Had anybody put together a draft of a sublease?

Each counsel responded that he was "unaware of any." It is difficult to understand why Giancarli did not mention his "Offer" to Avis in his August 5 testimony. This wonderment turned to incredulity when it developed in his testimony of August 9, after the "Offer" surfaced in Avis's closed files, that Giancarli would have made his trip to Avis in late 1963 or early 1964 without taking with him his "Offer" as a basis for the negotiations. A careful examination of the "Offer" reinforces the foregoing assessment of Giancarli's credibility.[8]

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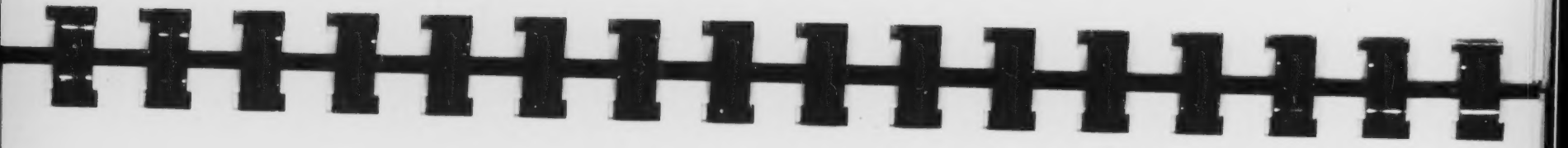
8. Defendant Intown argues that because "the document [offer to lease and to purchase] ...was not accepted within the fourteen (14) day limitation period as stipulated, and there was never any mutual agreement by both parties as is evidenced by the lack of initials by George Giancarli or Nicholas Syracopoulos," court's exhibit No. 1 should be stricken and not admitted into evidence.

As to the limitation period, Avis and Giancarli honored the purchase terms of the "Offer" so the 14-day limitation was waived.



8. Continued:

However, the issue is not whether Giancarli's "Offer To Lease and To Purchase" constituted a binding contract in any or all of its parts but whether the "Offer" is proper evidence. More particularly, is it a statement which is not hearsay under Federal Rule of Evidence 801(d)(2) and relevant, Fed. R. Evid. 401. The "Offer," prepared under the direction of George Giancarli and signed by him on behalf of a nominee corporation (Intown), is "offered against a party" (Intown). It is "(A) [its] own statement, [given by Giancarli] in ...a representative capacity." Moreover, the "Offer" is "(C) a statement by a person authorized by [it] to make a statement concerning the subject, or (D) a statement by [its] agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." Obviously Giancarli had the authority to speak for the corporation which he formed to sublet the Carey premises. Thus, under Rule 801(d)(2), Giancarli's "Offer" is not hearsay.

Moreover, it is relevant evidence. In the words of Rule 401, the "Offer" has a "tendency to make the existence of [the] fact[s] that [are] of consequence to the determination of the action more probable... than [they] would be without the evidence." The court has already concluded that under Ohio's parol evidence rule, the "Offer" is relevant and admissible to determine the intent of the parties. As the following text specifically demonstrates, Giancarli's "Offer" provides an undisputable documentary basis which challenges his described conversation with Allan Mitchell of Avis. Hence, the relevance of the "Offer" is clear. Defendant's objection to court's exhibit No. 1 and its motion to strike the exhibit are denied. The document was properly received in evidence.

The February 25, 1964 letter of W. J. "Jack" Marshall to R. K. Pine of Avis and Marshall's testimony of August 9, 1985, shows that Giancarli's "Offer" was recognized by the parties in consummating the lease and purchase transaction. Marshall testified that the reference in his letter of February 25, 1964, to the "purchase agreement" was a reference to the "Offer," which at least as an offer to purchase Avis's lot was accepted by Avis.

Therefore, Giancarli submitted the "Offer" to Avis. It is also found that he had received a copy of the "Offer" prepared by attorney Syracopoulos. The copy of the "Offer" discovered in Avis's files, bears "NCS:bj," top line note, that it was "1 0 5 cc Nov. 18, 1963." This notation corresponds to Syracopoulos's (NCS) testimony that he normally sent the original and a copy to the "other party," "gave one to George" and kept one or two copies. Nonetheless, Giancarli testified on August 9 that he "never saw the document again after [he] signed it" and that

he had "no idea what happened to it." This testimony is not credible.

Giancarli testified that the subject of the offer to lease and purchase did not come up in his conversation with Mitchell and that he did not "bring the subject up" because "[e]verything seemed to be fine." Of course, had he brought "the subject up", i.e., his "Offer" of November 19, 1963 to Avis, the amount of his rent proposal in his "Offer" would have contradicted his testimony that when Mitchell requested $425 a month he insisted on paying no more than $350 a month.

Paragraph 3.A. of Giancarli's "Offer" discloses that, as originally typed, Giancarli offered to lease the demised premises for a term of ten years "at a total rental of $36,000.00" ($300 a month). It is evident that Frank J. Max, Jr., who signed the document as vice president of Avis, along with R. K. Pine as secretary, initialed the x-ing out of the $36,000 and the typed-in amount of $42,000 ($350 a month) for the said ten year period. Thus, the $350 a month figure agreed

to in the sublease for the original ten-year period was actually proposed by Avis through Frank J. Max and R. K. Pine. It was not George Giancarli who proposed $350 a month, as he testified. The substitution in the "Offer" of $42,000 rent for the ten-year period was not initialed by Giancarli, as seen. However, the adoption of this amount in the sublease drafted by his attorney shows that he accepted Avis's counter rent proposal for the first ten-year period.[9]

The Court concludes that Giancarli's testimony that negotiations with Allan Mitchell of Avis in late 1963 or early 1964 produced the terms of the sublease, is repudiated by Giancarli's rent offer in the "Offer" and by the Avis rent counterproposal.

The conclusion that Mitchell did not

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9. The record is silent on whether a copy of the signed copy of Giancarli's "Offer" initialed by Max and Pine and penciled "Second Draft," was sent by Avis to Giancarli or his counsel or to Avis's Cleveland counsel, Melvin M. Roberts. However, the fact remains that the sublease incorporated Avis's counter rent offer of $350 a month.

negotiate the sublease with Giancarli invites the query as to what representative or representatives of Avis did engage in sublease negotiations with Giancarli or his attorney, Nicholas Syracopoulos, or both. That negotiations must have occurred may be reasonably inferred from the evident changes in style and in some of the content between the November 19, 1963 "Offer" and the March 21, 1964 sublease consummated by the parties. More particularly, the provisions relating to term, rent, renewal and taxes in the two documents are similar in some respects but vary in other respects. Also, the mutual covenants of the sublease are not present in the "Offer."

R. K. Pine was one of the two Avis officials who accepted Giancarli's "Offer" and he was one of two Avis officials who executed the sublease; therefore it is likely he would have known about the sublease negotiations. He is deceased. Attorney William J. "Jack" Marshall, Jr., was called as a court witness after his letter to Avis

was disclosed during trial. He testified that as far as the "Offer" was concerned it was his present recollection that Mel Roberts, deceased, had more to do with that document than he did. he went on to say that with regard to negotiations, he did not know specifically what negotiations were done, if any.[10] He said that Avis was more Mel Robert's client that his (Marshall's). He said that it was his recollection that the sublease was a document that Mel Roberts was concerned with.[11]

Consideration of sublease negotiations is hampered by the inability to hear the testimony of Avis's officers Max and Pine and Avis's counsel Roberts, each of whom undoutedly had knowledge about the drafting and preparation of the sublease. The absence of the name of Allan Mitchell as witness or

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10. Asked if he was familiar with the name Allan Mitchell as to Avis, he answered, "No, not at the moment."

11. Asked if he had any discussion concerning the language that the rent provision "supplants" or the taxes provision "supplants" marshall answered, "You are asking

notary on the sublease corroborates his testimony that he did not participate in negotiating the sublease. Rejecting Giancarli's testimony that he negotiated the sublease with Mitchell and unable to hear from any other witness about sublease negotiations, the court turns now to the "Offer to Lease and To Purchase" for aid in construing the parties' intent as to the meaning of the pertinent provisions of the sublease.

B.

In this section, each pertinent provision of the sublease is compared with the parallel provision in Giancarli's "Offer to Lease And To Purchase."

The term of years in each document provides for a term of ten years, although necessarily, the actual commencement date of the sublease was subsequent to the proposed in the "Offer." The following language is

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11. Continued:

if I discussed language in sublease at the time of the closing, and I don't recall."

included in the "TERM" clause of the sublease but not in the "Offer":

> To have and hold the same...with all the rights and privileges of the said Lessee [U-Drive-It Company, Lessee under the recorded 99-year lease], but subject to all the covenants, agreements, limitations and restrictions contained in the above-mentioned lease from Lessors [Careys] to Lessee, except as the same are herein specifically limited or changed.

By this language of the sublease, the parties agree that Intown assumes all of the obligations of the 99-year lease "except as the same are herein specifically limited or changed." Similarly, in the "Offer" Giancarli had agreed "that a sublease will be entered into between the newly formed corporation, which will be Purchaser's Nominee, containing the provisions set forth above subject to the limitations and conditions in the original lease contained except for those released with consent of Lessor [the Careys]." (Emphasis added). The quoted language of both documents makes it clear that the sublease was made subject to the

conditions of the 99-year lease;[12] but the sublease adds, "except as the same are herein specifically limited or changed."

Significantly, the first sentence of the "RENT" paragraph coincides with the rent provision of the "Offer" as amended by Avis. The "RENT" paragraph provides for monthly installments of $350 per month "during the said ten year term." However, the sublease adds a sentence not contained in the "Offer", namely, "This item supplants Article One of the said recorded lease." As defendant argues, the word "supplants" is synonymous with the word "replaces" and will be accorded that meaning. Once the reason for including this sentence is divined, the scope of the sentence becomes evident.

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12. The insurance obligations assumed by Intown demonstrate the integration of the several documents. Giancarli noted that the sublease had no insurance clause but added that the clause is in the 99-year lease. However, the 99-year lease required the lessee to insure buildings on the premises "against loss or damage by fire, windstorm, or cyclone." Actually, it was Giancarli's "Offer" which obligated him to "have liability insurance on the said demised premises," and he has continued to insure the premises with liability insurance.

As seen, the sublease is subject to the obligations of the "Recorded Lease" (the 99-year lease), except as "specifically limited or changed" in the sublease. Without that exception, Intown would have been required to pay, during said first ten-year term of the sublease, not only the $350 monthly rent fixed in the sublease but also the increases that were calculated as of September 1, 1964 under the COLA proviso of Article One of the "Recorded Lease." To limit the monthly rent to $350 throughout the first ten-year term, the sentence "[T]his item supplants Article One of the said Recorded Lease" was inserted. This protected Intown during said ten-year term.

Counsel for the defendant has argued that the inclusion of the same last sentence in the "RENT" and "TAXES" clauses reflects an intention of the parties, for all purposes including the application and operation of the renewal paragraph, to replace Article One of the "Recorded Lease with the rent paragraph of the sublease and to replace

Article Two of the "Recorded Lease" with the "TAXES" clause of the sublease. However, the addition of the same last sentence to the "TAXES" clause dictates only that, consistently, the word "supplants" in the "TAXES" clause be given the same meaning, i.e., "replaces" as in the "RENT" clause.[13]

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13. Giancarli's "Offer" provided in 3.F. that Intown was to pay for "utilities, including sewer tax, charged against the premises," but that "Avis will pay all taxes and assessments on the said demised real estate." As seen, Avis amended that provision to require the Purchaser (Intown) to pay taxes and assessments. That same obligation was imposed by Article Two of the "Recorded Lease." By making the sublease subject to the covenants and agreements of the "Recorded Lease," Intown would have been required to pay all taxes and assessments. But the "TAXES" clause of the sublease imposed an additional obligation on sublessee Intown. Intown was also required to pay all "taxes and assessments that accrue in the six-month period ending June 30, 1964." It was this additional obligation that "supplants Article Two of said Recorded Lease."

Giancarli testified similarly:

Article Two would not have been changed except for that offer, concession on my part to pay earlier taxes so that one was supplanted also for that reason. Otherwise it would have been unnecessary to change the tax clause.

Giancarli made the same concession to pay six months back taxes on the property he purchased from Avis. Undoubtedly, these back

Attention is now given to the renewal provision of each document. The "RENEWAL" clause of the sublease, supra at p.5, is compared with paragraph 3.B. of Giancarli's "Offer" which, in pertinent part, reads:

> ...AVIS hereby grants to the Purchaser the option to renew the above lease which AVIS or the original Lessee holds, at a cost no higher than is provided for in the original lease as recorded aforesaid.

By coupling the option to renew to the "lease which AVIS or the original Lessee holds," the meaning is conveyed that the renewal option, if exercised, accepts continuation of the lease until the year 2053. In other words, it proposed that the purchaser be given an option to renew the sublease for the balance of the 99-year term.

In more explicit words, but having the same meaning, the "Offer" in pertinent part, grants to the second party (Intown) "the option to renew...for the full unexpired

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13. Continued:

taxes concessions were negotiated with some representative of Avis. However, as seen, the court has concluded that the Avis representative was not Allan Mitchell.

term and all future renewals of the Recorded Lease." It is evident that the express language of each document provides only for one type of renewal period, i.e, renewal of the lease for the balance of the 99-year term. No language expressly grants renewal of a lease for the lesser term of ten years.[14] Hence, only an express agreement of the parties, or an agreement inferrable from their conduct, could permit the first ten year term of the lease to be followed by an additional term or terms of ten years.

Now it becomes timely to determine whether the parties agreed in the renewal paragraph of the sublease on what rent should be paid in a renewal of the lease until the year 2053, the renewal term as contained in

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14. Giancarli misreads the sublease renewal clause. Asked why he said "that the $350 monthly obligation would apply to any period of time after the expiration of the ten year terms," he answered:

> Because under the renewal, this lease can be renewed every ten years. We have the option to renew this lease every ten years.

the "RENEWAL" clause. The "RENEWAL" clause grants the "option to renew this lease for the full unexpired term," (i.e., until the year 2053). This statement makes no mention of any rental amount. However, defendant argues that the grant of this option to renew "this lease" incorporates the $350 monthly rental of the ten-year term as the rent for the renewal period.

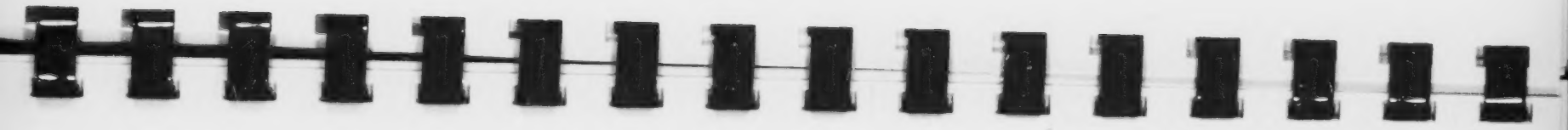
This argument encounters obstacles. The sublease is subject to the "covenants and agreements" of the 99-year Lease (pertinently here the rent provision of Article One) unless "specifically limited or changed." The words "option to renew this lease" do not specifically limit or change the rent provision of Article One. In addition, the words, "this lease," the object of the "option to renew" until the year 2053, has not clearly incorporated by reference or inference the $350 rent provision in the "RENT" clause. As seen, the $350 a month rental provided for in the "RENT" clause expressly replaces the rent provision of Article One of the "Recorded

Lease" only "during the said ten-year term" (1964 - 1974).

Finally, the construction defendant would give to the words "this lease" hardly can be said to express the intention of the parties, in view of the rent for the period of renewal until the year 2053 which Giancarli agreed to in his "Offer." While he specified that renewal should be "at a cost no higher than is provided for in the original lease as recorded aforesaid," he agreed that the renewal would be "subject to all the provisions in the original lease contained." The words "subject to" imposed the rent provided for in Article One of the 99-year lease. Article One calls for a cost of living allowance, calculated every ten years, in addition to the basic rent of $350 a month. In any exercise of renewal of the proposed lease until the year 2053, Giancarli's renewal clause in his "Offer" reflects his willingness to pay the cost of living allowance as provided in Article One of the "Recorded Lease" but no higher rent.

It is noted that this expressed willingness to pay rent as provided for in Article One of the "Recorded Lease" contradicts his oral testimony that he "would never accept a lease with a rental clause, with a cost of living." In addition, Avis was informed by the renewal clause of Giancarli's "Offer" that Giancarli would commit himself to $350 plus the cost of living allowance. Knowing that, it is not plausible that Avis agreed to incorporate a renewal clause in the sublease committing them to sacrifice the cost of living allowance and accept a flat $350 as the monthly rent if the option to renew the lease until the year 2053 was exercised. Given the ever present possibility of inflationary increases in the cost of living to which Avis's rental obligations to the Careys were locked, the evidence in the record does not present a believable ground that Avis agreed to such a commercially unreasonable, long-term commitment at $350 a month.

Under these circumstances, and the court having made these findings, it is



determined that the dispute concerning the intent of the parties as to the meaning of the contested sublease language warrants this court in declaring the rights of the parties, pursuant to 28 U.S.C. §§2201 and 2202. Each party has requested that the court utilize this remedy. Therefore, with respect to consideration of the declarations sought by each party, the court imposes the preponderance of evidence as the appropriate burden of proof.

Even when the renewal clause in Giancarli's "Offer" is read with the renewal clause in the sublease, the court finds that Avis has not proved that the parties intended to apply the cost of living allowance of Article One of the "Recorded Lease" to renewal of the sublease until the year 2053.[15]

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15. Plaintiff is not aided by citation of several Ohio decisions that support the proposition that ambiguous contract provisions are to be construed against the drafter. Although counsel for Giancarli did prepare the recorded sublease, Avis's real estate department was staffed by attorneys at the time the sublease was negotiated. Also, Avis was represented by competent Cleveland private counsel. Thus, the parties brought to the bargaining process equivalent levels of knowledge and

On the other hand, when the renewal clause of the sublease is considered alone, and even more clearly when it is considered together with the renewal clause of Giancarli's "Offer" the court finds that the defendant has not proved that the parties intended the monthly rental to be $350 during a renewal period until the year 2053. As seen before, the renewal clause of the sublease is not construed to call for a renewal for a period other than one until the year 2053.

Upon the foregoing facts, circumstances and inferences, the court concludes that it cannot declare that it was the intention of the parties that the costs of living allowance applies to any renewal of the sublease until the year 2053, the term of renewal specified in the renewal paragraph of the sublease. On the other hand, this court concludes that it cannot declare that it was the intention of

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15. Continued:

sophistication about this property transaction. The policy justifications generally supporting the rule of construction plaintiff urges upon this court are not present in this case.

the parties to fix $350 as the monthly rent for any renewal of the sublease until the year 2053.

In the next part, this court concludes from a combination of writings and conduct of the parties, that the parties agreed to a renewal of the lease for an additional term of ten years and that the rent for the additional term should be $350 a month. However, the court concludes that beyond such ten-year term(1974 - 1984), the sublease renewal clause, because of its indefiniteness, may not be enforced either to require that the cost of living allowance should be added to the monthly rent of $350, or to enforce a further ten-year term renewal at $350 a month.

Pertinently, Litsinger Sign Co. v. American Sign Co., 11 Ohio St. 2d 1, 14, 227 N.E.2d 609, 619 (1967), recognizes as "settled law" that

> ...if the parties' manifestations taken together as making up the contract, when reasonably interpreted in the light of all the circumstances, do not enable the court to determine what the agreement is and to enforce it without, in effect, "making a contract for the parties," no enforceable obligation

results. See 1 Corbin on Contracts, 394 and 398, Section 95; 1 Williston on Contracts (3 Ed.), Section 37; 11 Ohio Jurisprudence 2d, 283, Contracts, Section 42.

The language of the renewal clause is unenforceable because it does not specify the renewal period rent. Nor does the language provide that the rental for the renewal period is "subject to agreement between the parties," as in the lease reviewed in Moss v. Olson, 148 Ohio St. 625, 76 N.E.2d 875 (1947). Moss holds that a renewal covenant in a lease which leaves the rental to be determined by agreement between the parties is not void for uncertainty.[16]

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16. Defendant proffered the following answer of attorney Syracopoulos, a retired member of the law firm which has represented the Giancarlis in this entire transaction (1963 to date). As seen, he prepared the sublease:

> Q. The terminology, the terms, "This lease for the full unexpired term of the recorded lease."
>
> A. My answer would be that George had a lease for 10 years. Then he had the option of renewing it for A, the balance of the 99 years, and also, any continuation of the 99 years. That's what it says.

Q. And at what price?

MR. ROSENBERG: Objection, Your Honor.

MR. CHERPAS: Let me proffer again.

A. The price has got to be the same.

MR. CHERPAS: Proffer

A. The price has got to be the same because if it weren't I would say that it would state that the option to renew this lease at the same terms except for the price, to be negotiated or except for the price to be agreed upon.

I don't have that exception in there so it's a renewal of the lease; that's all, a renewal of the lease with the rent stated in Item - in the rent item and the taxes stated in the tax item.

This answer was preceded by this colloquy:

Q. The terms, "This lease for the full unexpired term of the recorded lease," was there any specific purpose for using that particular terminology?

MR. ROSENBERG: Objection, Your Honor.

THE COURT: Objection sustained, form of the question.

MR. CHERPAS: Now, let me - can we have a proffer on that, Judge?

THE COURT: Sure.

MR. CHERPAS: We will proffer an answer, Your Honor, and I talked to Mr. Syracopoulos earlier.

THE COURT: he can answer that.

In short, the court concludes: Moss does not control and the sublease renewal clause, because of its uncertainty, should not be enforced beyond the year 1984.

The Court now takes up the renewal transaction that transpired in early 1974 and the interactions of the parties in the ensuing seventies. The effect of these events on the rights of the parties under the sublease will be determined.

A.

James Fitzsimmons notified Giancarli in a letter dated February 22, 1974 that the "sublease...is set to expire on March 20,

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16. Continued:

THE WITNESS: What is the question again, Mr. Cherpas?

It is unclear whether in answering Syracopoulos relied on his memory of his "purpose" when he drafted the sublease renewal clause or whether he was contemporaneously interpreting the legal effect of the language actually used. Nevertheless, the proffered evidence was inadmissible. "Parol evidence as to what a party thought or meant...is admissible only when offered by his opponet." Maple Heights Teachers Assoc. v. Maple Heighs Bd. of Education, 6 Ohio St. 3d 314, 318, 453 N.E.2d 619, 622-23 (1983).

1974." The letter continues:

> According to the terms [of the sublease], you have the right to exercise an option to renew the term thereof for the full unexpired term of Avis' basic lease.
>
> I would appreicate your advice as to whether or not this option will be exercised.

As Intown's president, Giancarli responded to Fitzsimmons' request with a letter (dated February 28), set out in the margin.[17]

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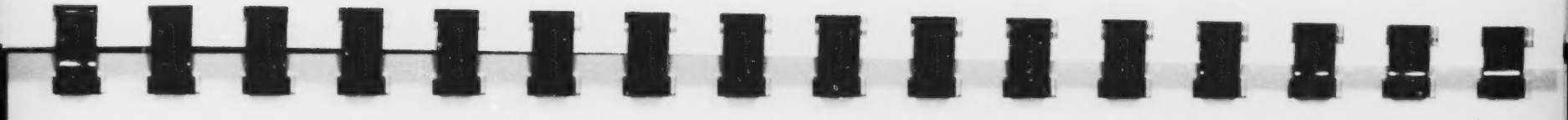
17. The letter states:

> In reply to your letter of February 22, 1974, reference is made to a ten year lease negotiated on March 21, 1964 and recorded in Summit County Record of Leases, number 384951, volume 4277, pages 173-177 between Avis Rent-A-Car Systems, [I]nc. and Intown Investors, Inc.
>
> Under the "Term" clause on page 2, the lease commences on May 1, 1964, and extends to Intown Investors all of the rights and privileges of Avis Rent-A-Car Systems contained in a basic 99 year lease with Louise and Harold Carey except for the following limitations and changes.
>
> The "Rental" clause supplants Article 1 of the basic lease and specifies an annual rental of $4200.00 payable in monthly installments of $350.00.
>
> The "Tax" clause supplants Article 2 of the basic lease requiring payment of all taxes and assessments after June 30, 1964 in addi-



Giancarli asked Fitzsimmons to "advise" him whether Giancarli should call a meeting of directors to take up the "lease option."

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17. Continued:

tion to accrued taxes and assessments prior to June 30, 1964.

On the 4th of February, 1969, Avis and the Careys signed a "Basic Lease Amendment" record number 556043, volume 4979, pages 332-334 eliminating "Article 12" and inserting in its place a "Substitute Article 12."

Subsequently, Intown Investors and Avis agreed to and executed a "Lease Amendment" by inserting a "Demolition and Rebuilding" clause between item labeled "Taxes" and item labeled "Renewal" on page 2 of the ten year lease referred to herein.

The "Renewal" clause on page 2 permits Intown Investors to renew this lease with Avis Rent_A-Car for the full unexpired term and all future renewals of the basic 99-year lease at any time during ten year periods.

Therefore, under the terms of our lease, the first ten year renewal option runs until May 1, 1974.

Our Directors' Meeting has not been held as yet this year and I am unable at this time to inform you as to whether or not the first option will be exercised.

If you so desire, I will call an early meeting and make the lease option our primary subject matter.

Please advise.

Fitzsimmons did not respond. On March 19, 1974, Giancarli notified Fitzsimmons by letter that "Intown Investors Inc. will renew for an additional term our sublease..."

Following this notice of renewal, Avis continued to bill Intown $350 a month and Intown remitted the money.

Apparently no other communication relating to the sublease occurred until Susan E. Gordon, an Avis attorney, wrote Intown an undated letter that was received by Intown on November 3, 1978. The letter demanded rent payment of COLA arrears. Fitzsimmons testified that he directed Avis Attorney Gordon to issue the letter when he was informed by the accounting department at Avis that "arrears were accumulating." Gordon stated in her demand letter:

> It has recently been brought to our attention that the rent payable by Intown Investors, Inc., in accordance with its sublease agreement with Avis Rent A Car System, Inc., should have been increased to $651.20 per month for the ten-year period commencing September 1, 1974, and terminating August 31, 1984 in keeping with the adjustment made in Avis' rental obligation under the terms of its lease with Louise and Harold Carey.

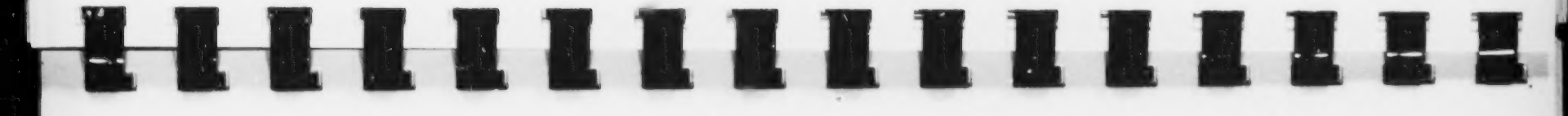
On November 6, 1978, Giancarli responded. He denied liability for any arrears in rental payments. His letter stated:

> The "Renewal" clause permits Intown Investors to renew the above Sublease for the full unexpired term of the Basic ninety-nine year lease at any time during the ten year term.
>
> Intown Investors activated the "Renewal" clause in the Sublease on March 19, 1974 by written notification to Mr. Fitzsimmons The Director of Real Estate.

Plaintiff contends that Intown's rental payments should have been increased to $651 per month for the ten-year period commencing September 1, 1974, with the adjustment made in Avis's rental obligation to the Careys on that date. This contention relies on the premise that Intown, as well as Avis, intended that the sublease renewal clause offered renewal at a rent equivalent to $350 per month, plus the COLA paid by Avis to the Careys. However, this court previously has ruled that plaintiff Avis has not proved that the parties intended to apply the cost of living allowance of Article One of the "Recorded Lease" to renewal of the sublease until the year 2053.

Moreover, the documented exchange between Fitzsimmons and Giancarli in 1974 and the subsequent conduct of the parties establishes that there was an agreement to extend the sublease for ten years at $350 a month (1974-1984).

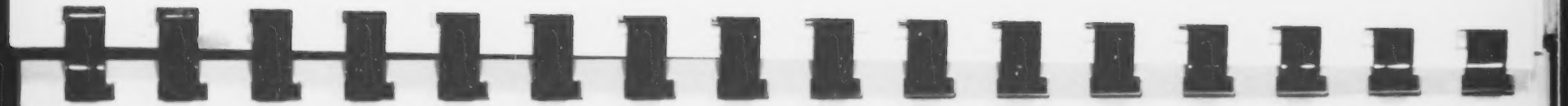
The February 22, 1974 Fitzsimmons letter requesting advice concerning Intown's exercise of the option to renew did not refer to rent for the renewal period. As his letter response of February 28, 1974, shows, see text in n.17, Giancarli detailed the terms of the sublease. He specifically explained that the lease "extends to Intown Investors all of the rights and privileges...contained in a basic 99-year lease...except for the following limitations and changes." He next stated that "the 'Rental' clause supplants Article 1 of the basic lease" and "specifies an annual rental of $4,200.00 payable in monthly installments of $350.00." He summarized the sublease "TAXES" clause and 1969 amendments to the sublease. Giancarli then asserted that the "Renewal clause...permits Intown



Investors to renew this Lease with Avis Rent-A-Car...for the full unexpired term...of the basic 99 year lease at any time during the ten year period." Giancarli's letter to Fitzsimmons closed by pointing out that the option to renew "runs until May 1, 1974" (not March 20, 1974 as provided in Fitzsimmons' notice). The last sentence of the letter requests Fitzsimmons to "[p]lease advise."

Fitzsimmons testified that he did not have any independent recollection of having read the February 28, 1974 letter, but he said he also did not take any reaction to it. Nevertheless, the court finds that Avis received the letter, and it is charged with knowledge of its contents. No response from Avis was forthcoming. Giancarli notified Avis in his brief letter of March 19, 1974 that Intown would renew "for an additional term our sublease."

An "extension option under a lease is merely a continuing offer from the lessor to the tenant." It "does not become binding



until accepted by the tenant." Wessel v. Newhof Stores, Inc., 11 Ohio Op. 476, 479 (Com. Pl. Ct. 1938).[18] Fitzsimmons letter of February 22 tracked the language of the sub-lease renewal clause ("you have the right to exercise an option to renew the term thereof for the full unexpired term of Avis' basic lease"). The letter made no independent offer. It merely reminded Intown of its right to accept the offer (option to renew) set forth in the sublease. However, Fitz-simmons did correctly recite the period of renewal called for under the sublease renewal clause. In contrast, Giancarli's letter response of February 28, 1974, described a different renewal term. He stated in the letter:

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18. This statement of Ohio law conforms to 50 Am. Jur. 2d Landlord and Tenant §1181 (1970), that "A lessor's covenant or agreement to renew gives a privilege to the tenant, but is nevertheless an executory contract, and until the tenant has exercised by way of some affirmative act, he cannot be held for the additional term."

> The "Renewal" clause on page 2 permits Intown Investors to renew this lease with Avis Rent-A-Car for the full unexpired term and all future renewals of the basic 99 year lease at any time during ten year periods. [Emphasis added].
>
> Therefore, under the terms of our lease, the first ten year renewal option runs until May 1, 1974...I am unable at this time to inform you as to whether or not the first option will be exercised. [Emphasis added].

Actually, the sublease gave Intown the "option to renew this Lease for the full unexpired term...of the Recorded Lease at any time during this term." (Emphasis added). In other words, at any time within the first ten-year period, Intown could exercise its option to renew the sublease for "the full unexpired term" of the basic 99-year lease.

Not only did Giancarli's letter of February 28 state a different renewal term (i.e., ten years) than asserted in the renewal clause of the sublease, but Giancarli also indicated that the rent for the renewal period would be $350 a month. He did so by stating, without limitation, that

> [t]he "Rental" clause supplants Article 1 of the basic lease and specifies an

annual rental of $4200 payable in monthly installments of $350.00.

This statement conflicts with this court's earlier determination that the "TERM" clause, "RENEWAL" clause and "RENT" clause, reasonably construed, replace Article One of the "Recorded Lease" by the $350 monthly rental (without the cost of living allowance of Article One) only during the "said ten year term" (1964 - 1974). The replacement rent of $350 a month does not apply to the renewal period.

A statement shall be given the legal effect of a counter-offer when its terms depart from the terms of the offer to which it pertains. Retterer v. Bender, 106 Ohio App. 369, 373, 154 N.E.2d 827, 830 (Ct. App. 1958); Restatement (Second) of Contracts §59 (1981). Accordingly, Giancarli's letter and notice of renewal are determined to be a counter-offer to the option to renew provided in the "RENEWAL" clause. As described in Giancarli's February 28, 1974 explanatory letter and his March 19, 1974 notice of renewal for "an additional term" the terms

of the counter-offer proposed renewal of the sublease at the orignal rent term of $350.

Following Intown's March 1974 renewal, Avis continued to bill Intown every month at $350. Intown paid this rent each month without objection for 4 1/2 years. Because of Avis's acquiescence, the court concludes that by its silence and conduct for this long period of time, Avis accepted the counter-offer, i.e., an additional ten-year term at $350 a month. See Lane v. Greene, 21 Ohio App. 62, 68, 152 N.E. 790 (1926); Restatement (Second) of Contracts §69(1)(c) (1981); cf. United States v. Bostwick, 94 U. S. 53 (1877).[19]

Defendant claims that it is entitled to renew the sublease for successive terms of ten years until the expiration of the 99-year lease. However, Hallock v. Kintzler, 142 Ohio St. 287, 51 N.E. 2d 905 (1943), syllabus ¶2, makes it clear that "a lease

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19. Defendant has raised the alternate defense of laches. The Court has determined that Avis' inaction from 1974 to 1978 constitutes an implied acceptance of a counteroffer. Since the Court is denying COLA damages during this 4½ year period, no prejudice has resulted, and

will not be construed to create a right to perpetual renewal unless the language employed clearly indicates that it was the intention of the parties so to do." There, a general option for renewal from year to year was construed to give the Lessee the right to only one such renewal. Here, Giancarli's letter of February 28, 1974 was limited in its application by his March 19, 1974 notice that "Intown Investors, Inc. will renew for an additonal term our sublease..." Therefore, it is concluded that Giancarli's two letters constitute a counter-offer that applied only to the 1974-1984 term of ten years when these letters are considered in conjunction with the conclusions of this court reached earlier, supra at pp. 28-29.

Moreover, it is concluded that Giancarli's counter-offer of renewal "for an additional term," although accepted by Avis's

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19. Continued:

laches does not apply. 42 O.Jur. 3d Estoppel and Waiver §28 (1983).

silence and conduct, bound Avis only for that term. Avis's silence and conduct did not constitute agreement by Avis, as claimed by Intown, that the sublease renewal clause was amended to permit options to renew for successive ten-year terms until the year 2053. Following the 1974-1984 term, and as the Court has held, supra at pp. 34-35, the sublease renewal clause is unenforceable.

V.

In subparts A and B this court takes up several issues raised by both sides. In subpart C the Court specifies the post-May 1, 1984 remedy.

A.

As seen at the outset, plaintiff Avis has sought reformation of the lease, citing mutual mistake or fraud. Plaintiff also argues that this court has the authority "to rescind the sublease because there was no meeting of the minds between the parties and because of its obvious unconscionability."

The evidence, as previously particularized, reveals that grounds for reformation

are not present in this case. Therefore, plaintiff's request for reformation is denied."[20] As seen, the controversy between the parties revolves around the meaning of

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20. Asked by his counsel about his negotiations with Avis for property (northerly one-half of Lot 122) contiguous to the Carey property he was negotiating to sublease from Avis, Giancarli testified, "Well, in addition to just paying 350 and the ten year term, I would not get involved with any of the arrangements unless I was able to purchase that property." Later in 1968 he purchased the southerly one-half of lot 122. To the west of the Carey property (which he subleased from Avis) is an alley (Maiden Lane). West of the alley are lots 116 and 117, which Giancarli and his wife purchased during the 1960's. Thus, by 1968 he owned all of the property except for the subleased Carey lot 121 that is bound by S. High Street on the east, E. Buchtel Avenue on the north, S. Main Street on the west and Spring Alley on the south.

In this area he contemplated constructing "a parking deck, a small professional area and a small motel." Asked if this reconstruction development was contingent upon his ability to get a second 99-year lease from Avis, he answered, "and a change in Article 12 [of the Carey 99-year lease] which is the self-containment clause." After the taking of evidence ended, counsel for Giancarli stated, "[I]n the event the Court would insist on reformation then the Court [should] also order Avis that they are obligated under the terms of this particular sublease, they are obligated to renew another 99-year term." Because the court has not ordered reformation of the contract as requested by Avis, the court need not consider Giancarli's and Intown's alternate request.

certain sublease provision and the intent of the parties in using such language. "[D]isagreement over the meaning of [a properly negotiated contract] does not constitute a mistake of any type." Bowater North America Corp. v. Murray Machinery Inc., 773 F.2d 71, 75 (6th Circ. 1985) (applying Tennessee law). Moreover, there is no mutual mistake of fact where both parties have full knowledge of the facts and circumstances surrounding the execution of the agreement. Baltimore & Ohio R.R. Co. v. Bing, 89 Ohio St. 92, 105 N.E. 142 (1913). Plaintiff has not proved that the evidence reveals a mutual mistake of fact, mistake due to fraud, or mistake by Avis concerning a basic assumption of the contract of which Intown had reason to know.

Plaintiff also has not met the standard of unconscionability (to support recission) as established by Ohio Courts. In Ohio, unconscionability has been discussed as "onerous, oppressive or one-sided, but also that the terms bear no reasonable relation

to the business risks...." Central Ohio Co-operative Milk Producers, Inc., v. Rowland, 29 Ohio App. 2d 236, 240, 281 N.E.2d 42, 44 (1972); see Polster v. Park View Federal Savings & Loan Assoc., No. 49103, slip op. (Cuyahoga Cty. Ct. App. June 27, 1985) (available on LEXIS, States Library, Ohio file); North Consultants, Inc., v. Stimel-Givens, No. 83AP-951, slip op. (Franklin Cty. Ct. App. May 14, 1985) (available on LEXIS, States Library, Ohio file). As seen, the court's factual findings do not support classifying the sublease as an unconscionable contract.

B.

In a post-trial submission, plaintiff Avis moves this court to amend the complaint "to include an allegation and to permit a finding by this Court that the Defendant, by and through its sole operating officer and major shareholder, George Giancarli, perpetrated a fraud on the Plaintiff." Elaborating, Avis argues:

Giancarli misrepresented to Plaintiff

> and the Court that the "Rent" provision of the Sublease provided for a fixed rent through the year 2053. This fraud arose as early as 1964 when Giancarli negotiated the Sublease with Plaintiff and failed to disclose the existence of the Offer....

This Court has previously found that Giancarli submitted to Avis his "Offer" of November 19, 1963, that Giancarli offered to pay rent of $300 a month for a term of ten years, and that Avis officials counteroffered with $350 as the monthly rental for said ten-year term. Other findings have been made with reference to the "Offer" which served as an offer, accepted by Avis, for Giancarli's purchase of the northerly one-half of Lot 122 on E. Buchtel adjacent to the Carey lot 121. Thus, Giancarli disclosed rather than concealed his "Offer" during the 1963 and 1964 negotiations. As defendant correctly notes, Avis, through Pine and Max, knew of the "Offer". Hence, plaintiff cannot sustain its contention that "this fraud arose as early as 1964 when Giancarli negotiated the Sublease with Plaintiff."

Hence, the plaintiff's motion to amend

the complaint to charge fraud must fail. Giancarli's failure to disclose the "Offer" during the progress of this case is another matter. That failure of disclosure does bear on his credibility as this court has found in several respects.

C.

In parts III. and IV. above, the court has determined and declared that post-May 1, 1984 the renewal clause of the sublease is unenforceable. Thus, defendant's request that the court dismiss the complaint is denied.

In parts V.A. and B., the court has denied plaintiff's other requests for relief. Only the post-May 1, 1984 remedy remains for consideration.

On March 27, 1984 Giancarli, as president of Intown, notified Avis "that once again we will exercise our option and renew for an additional term commencing on May 1, 1984, our sublease to the above described property" (20 E. Buchtel Avenue, Akron, Ohio). In its response of April 19, 1984, and after reciting

the pendency of litigation, Avis reminded Intown of Avis's "position in the litigation that Intown is in violation of the Sublease because it has refused to increase its rental payments to Avis despite repeated demands by Avis that it do so." The 1984 renewal has been held in abeyance pending this court's adjudication of Avis's and Intown's essentially declaratory action.

The Court has now determined that the renewal clause is not enforceable beginning with May 1, 1984.

Since Intown continues to occupy the subleased premises, the court must determine the rent for the period subsequent to May 1, 1984. Whether the rent after May 1, 1984 should continue to be $350 or should be fixed at a different amount is a subject the court will allow the parties to attempt to negotiate, along with negotiation of any further renewal period beyond May 1, 1984. Should the parties fail to agree upon the rent for Intown's occupancy of the premises after May 1, 1984 until occupancy is terminated,

the court will take evidence concerning and will determine a reasonable market rate. A hearing date for the taking of said evidence is set for January 31, 1986 at 9:00 a.m. Meanwhile, the court withholds entering a Rule 58 order.

IT IS SO ORDERED.

/s/ William K. Thomas
U. S. DISTRICT SENIOR JUDGE